Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

(3)

No. 91-1399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UTE DISTRIBUTION CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONERS

MAX D. WHEELER
MICHAEL D. BLACKBURN
DAVID W. STEFFENSEN
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000

REX E. LEE *
CARTER G. PHILLIPS
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 7, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10

TABLE OF AUTHORITIES

CASES — Page

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 3
Board of Governors v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986) 6
Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 6
County of Yakima v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992) 6
Russello v. *United States*, 464 U.S. 16 (1983) 3
Squire v. *Capoeman*, 351 U.S. 1 (1956) 2, 5

STATUTES

Ute Indian Supervision Termination Act, Pub. L. No. 671, 68 Stat. 868 (1954) (codified at 25 U.S.C. §§ 677-677aa) 1
677i 5
677p 1,5

LEGISLATIVE MATERIALS

H.R. Rep. No. 2744, 84th Cong., 2d Sess. (1956) 4
S. Rep. No. 2432, 84th Cong., 2d Sess. (1956) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1399

UTE DISTRIBUTION CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONERS

The United States raises three basic arguments in its opposition. First, the United States baldly asserts that the distribution of assets from petitioner Ute Distribution Corporation ("UDC") to the individual petitioners constitutes "property distributed" within the meaning of Section 17 of the Ute Partition Act, 25 U.S.C. § 677p, and is therefore subject to tax. Second, although the United States concedes that the Department of Interior, the agency responsible for administering the Act, has always viewed UDC distributions as exempt from income tax, it argues that Interior is wrong. The United States asserts that, notwithstanding Interior's interpretation of Section 17, the statutory language is "plain" and therefore that Interior's interpretation is entitled to *no* deference. Br. in Opp. 13. Third, even though the distributions of tribal trust assets through UDC are the

only distributions of tribal assets subject to tax pursuant to any of the termination acts enacted in the 1950s, the United States maintains that UDC distributions are not treated differently from distributions of assets to terminated members of other tribes.

None of the arguments raised in the United States' opposition withstands scrutiny. Indeed, the positions adopted by the United States demonstrate that the decision below cannot be reconciled with important principles of statutory construction and Indian law recognized by this Court. This case therefore merits review by this Court.

1. As the petition makes clear (Pet. 14-16), Section 17 includes a blanket exemption from taxes for "distribution of the assets" under the Act, provides that "property distributed" is exempt from property tax until August 27, 1961, and provides that "property distributed" and income derived therefrom is subject to taxes after August 27, 1961. By asserting that Section 17 subjects UDC distributions to income tax after August 27, 1961 (Br. in Opp. 10), the opposition of the United States ignores the fundamental issue before this Court—whether a distribution from UDC constitutes a "distribution of . . . assets" within the meaning of Section 17 and is therefore exempt from income tax.[1] The United States makes *no* attempt to reconcile the competing phrases in that provision. Congress used two different phrases in Section 17—"distribution of . . . assets" and "property distributed"—but the United States' interpretation requires these phrases to mean the same thing. This Court's decisions do not per-

---

[1] Petitioners do not dispute the general statements of the United States regarding income taxes (Br. in Opp. 9) and the principle that Indians are subject to income taxes in the absence of a specific statute relating to their taxation (*id.* at 9-10). But the incantation of these general principles certainly does not advance the argument that the court of appeals properly interpreted Section 17. *Cf. Squire* v. *Capoeman*, 351 U.S. 1, 6-8 (1956).

mit such a result. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Further, the United States ignores the fact that UDC distributions are distributions of indivisible tribal assets in the form of oil, gas and mineral rights held in trust for the mixed-blood and full-blood members of the Tribe. The government asserts that "cash distributions received by the petitioners in 1984 from UDC consist of amounts that UDC earned on the nondivisible assets it held." Br. in Opp. 10. But these indivisible assets are not held by UDC and were *never* distributed to UDC. Rather, those assets remain in trust, held for the current and terminated members of the Ute Tribe. See *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 139 (1972); Pet. App. 4a. UDC merely acts as a conduit for distributions of the indivisible assets to the mixed-blood members of the Tribe. A distribution of tribal assets occurs when UDC makes payments to its stockholders.

The United States fundamentally misconstrues and distorts the argument of petitioners regarding the August 27, 1961 time limitation set forth in 25 U.S.C. § 677p. Far from being a "tortured and illogical construction" of Section 17 (Br. in Opp. 11), petitioners' interpretation of that provision is the only interpretation that comports with its plain language. Contrary to the United States' position (*id.* at 11-12), petitioners did not assert that the time limitation applies only to property taxes. Rather, Section 17 provides that (1) at the time of distribution, tribal assets are not subject to taxation; (2) until 1961, tribal assets, after being distributed, are exempt from property taxes; and (3) after August 27, 1961, after tribal property is distributed, that property and the income from such property is subject to federal and state taxes.[2]

---

[2] Although the United States attempts to make much of the fact that Section 17 contains an exception for corporate income taxes (Br. in Opp. 11-12), that provision was specifically added "to

Indeed, the United States acknowledges that this is a permissible interpretation of Section 17. Both petitioners and the United States recognize that the Ute Partition Act should be interpreted *in pari materia* with other termination statutes adopted by the Eighty-third Congress. Pet. 21-22; Br. in Opp. 11 n.7. In its opposition, the United States recognizes:

> The tax provisions in the termination Acts other than the Ute Partition Act generally stated that distributed tribal property would not be subject to tax at the time of distribution, but following distribution the property and income therefrom would be subject to tax.

Id. at 5. This is the only interpretation of Section 17 that comports with the language of the Act and with this Court's principles of statutory construction. Certain Ute tribal assets, such as cash, were distributed to the mixed-blood members of the tribe prior to 1961, and those assets were not subject to tax at the time of their distribution. After August 27, 1961, interest on any such cash assets deposited in a bank, for example, was subject to tax as income derived from distributed property. In contrast, however, the oil, gas and mineral rights of the Ute Indian Tribe were not susceptible to immediate distribution and Congress recognized that those assets would be distributed over time. See Pet. 5-6. Thus, under the United States' description of the taxation of distribution of tribal assets and, more importantly, under the *plain language* of Section 17, the distribution of the indivisible assets by UDC is not subject to tax at the time of distribu-

---

preserve the tax-exempt status of the distributions from the trust funds held by the United States Government on the principle that the corporation would merely act as a conduit for the transmission of funds received from the Government to the members of the mixed-blood group." H.R. Rep. No. 2744, 84th Cong., 2d Sess. 2 (1956) (emphasis added); S. Rep. No. 2432, 84th Cong., 2d Sess. 2 (1956).

tion. It is irrelevant under the language of the Act whether that distribution occurs in 1956 or in 1984.[3]

Finally, the United States asserts that the court below properly determined that UDC distributions are taxable because "its stock was distributed tax-free to each member of the mixed-blood group" and distributions from UDC represent " 'income derived' from that property." Br. in Opp. 12. But this argument reflects a fundamental misunderstanding of the operation of 25 U.S.C. § 677p and completely ignores the fact that Congress specifically referred to UDC's role in "the distribution of" indivisible tribal assets. 25 U.S.C. §§ 677i, 677p; see Pet. 15-16. The Act in general and Section 17 in particular govern the distribution of tribal assets. The stock of UDC is not and never was a tribal asset. Therefore, the distribution of UDC stock is not subject to the provisions of Section 17; it is the underlying tribal assets held in trust that are at issue here and that are subject to Section 17.[4]

2. Since the Department of Interior's first comments on the Ute Termination Act as part of the Act's consideration by Congress in 1954, Interior has consistently recognized that distributions of indivisible tribal assets are exempt from income tax. See Pet. 7-8, 15-16; Pet. App. 31a-66a.[5]

---

[3] The situation here parallels that of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), a case wrongly cited by the government for the proposition that UDC distributions to petitioners should be subject to income tax. Br. in Opp. 5, 9-10. There, this Court held that "it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens." *Squire*, 351 U.S. at 9.

[4] Although the United States highlights the fact that petitioner Chris Denver is a non-Indian stockholder (*see* Br. in Opp. 7 n.5, 12-13), it is far more significant that several full-blood Ute Indians, such as petitioner Henry Wopsock, agreed to be terminated from the Tribe in exchange for the benefits set forth in the Act.

[5] Although the United States asserts that Interior "originally" expressed the view that UDC distributions were exempt from taxa-

Significantly, the United States does not dispute that the Department of Interior is responsible for administering the Act and concedes that Interior's interpretation of Section 17 should be analyzed under the two-step deference test set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the United States insists that Interior's contemporaneous, consistent and long-standing interpretation of Section 17 is "at odds with the plain language of the statute" under the first step of the *Chevron* test. Br. in Opp. 13-14. But the *Chevron* line of cases on which the government relies makes clear that the intent of Congress must be "unambiguously expressed" before an agency's interpretation is entitled to *no* deference. See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Chevron*, 467 U.S. at 842-43. As the first argument set forth above starkly reveals, at a minimum, Section 17 is ambiguous and Interior's long-held and consistent administrative interpretation should have been followed.

The petition also made clear that the decision below conflicts with a long line of decisions of this Court holding that ambiguous statutory provisions should be interpreted liberally in favor of Indians. Pet. 17-19. Although the United States asserts that this principle does not apply when a statute is unambiguous (Br. in Opp. 14), it has not attempted to explain how Section 17 is unambiguously clear in light of this Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992). As petitioners demonstrated, that case makes plain that Section 17 is, at a minimum, ambiguous and should be interpreted liberally in favor of the mixed-blood members of the Tribe. Pet. 18-19. The government has failed to show that the decision below is consistent with decisions of this Court

---

tion (Br. in Opp. 13), Interior officials expressed that view as recently as 1987 and specifically rejected the Internal Revenue Service's interpretation of Section 17 that lead to this litigation. Pet. App. 31a.

recognizing this fundamental tenet of Indian law, and review by this Court is therefore warranted.

3. Petitioners demonstrated that the decision below conflicts with important and well recognized principles reflected in the now abandoned termination policy and in the trust relationship through which the indivisible tribal assets are held. See Pet. 22-23. The United States attempts to minimize the importance of the question presented in this case by asserting that there are two reasons why review by this Court is not warranted.

First, the United States argues that the taxation of the distribution of the trust assets is not inconsistent with that trust relationship. Again, however, the United States incorrectly asserts that "[t]he property that gives rise to the entitlement to UDC distributions is the UDC stock." Br. in Opp. 15. But it is clear that the property that gives rise to the distributions consists of the tribal assets held in trust that were not susceptible to equitable and practical distribution. These assets are to this day held by the United States in trust for the terminated members of the Ute Tribe, and Indian policy reflects that the distribution of tribal trust assets to individual Indians is not subject to income tax. See Pet. 22-23.

Second, the opposition contends that there is no disparate tax treatment of terminated Utes vis-a-vis other Indians terminated during the 1950s, because the other termination acts contemplated that assets would be distributed "promptly." Br. in Opp. 16. The government asserts:

> If the nondivisible assets had been susceptible of equitable and practical distribution, they would have been transferred to the mixed-blood members prior to August 27, 1961, and the income thereafter realized would have been fully taxable to the recipients.

Id. Petitioners do not dispute this statement. But the government's hypothetical does not change the fact that

the tribal trust assets were not susceptible to division and distribution. Indeed, those assets have never been distributed. There is no question that under the other termination statutes, assets were not taxed at the time of their distribution. Further, it is clear based on the language of Section 17 that Ute tribal assets should not be taxed at distribution. Because of the decision below, only the terminated mixed-blood Utes, among all of the members of the various Indian tribes terminated during the 1950s, are subject to income tax on the distribution of their tribal assets. Fundamental fairness dictates that this Court review the claims of the singularly disadvantaged group and correct this injustice.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAX D. WHEELER
MICHAEL D. BLACKBURN
DAVID W. STEFFENSEN
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000

REX E. LEE *
CARTER G. PHILLIPS
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 7, 1992